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# **Enforcing Human Rights Standards in the Former Yugoslavia: The Case for an International War Crimes Tribunal**

CHRISTOPHER C. JOYNER\*

## **I. INTRODUCTION**

War is an evil phenomenon. Its consequences reach far beyond the armed forces and borders of the belligerent parties involved. The tragedy and suffering of these realities are amply exemplified today in the pervasive regional violence that has followed the political disintegration of the former Yugoslavia into Slovenia, Bosnia-Herzegovina, Croatia, Macedonia, and the Federal Republic of Yugoslavia (comprised of the republics of Serbia and Montenegro).

Ongoing armed conflicts in the territory of the former Yugoslavia since June 1991 have produced numerous allegations of grave breaches of the Geneva Conventions and other violations of international humanitarian law.<sup>1</sup> These charges, which have been leveled primarily

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1. A considerable number of reports containing allegations of grave breaches of international humanitarian law have been submitted to the special Commission of Experts established pursuant to Security Council Resolution 780 (1992). Governments issuing reports included Austria, Bosnia-Herzegovina, Croatia, France, Germany, Norway, Slovenia, Ukraine, the United States and Yugoslavia. Reports from United Nations agencies and authorities directly concerned with the humanitarian situation include those of the Special Rapporteur appointed under resolution 1992/S-1/1 of the Commission on Human Rights to investigate first hand the human rights situation in the former Yugoslavia, the Special Rapporteur of the Commission on Human Rights on Extrajudicial, Summary and Arbitrary Executions, the Office of the United Nations High Commissioner for Refugees, the Human Rights Committee and the United Nations Protection Force (UNPROFOR). The Conference on Security and Cooperation in Europe has submitted several reports, including its report on the CSCE Mission to detention camps in Bosnia, the report of CSCE Human Rights Rapporteur Mission to Yugoslavia, and the Report of the Mission to Bosnia and Herzegovina and to Croatia under the Moscow Human Dimension Mechanism of the CSCE. Finally, reports have also been prepared by several nongovernmental organizations (NGOs), many of which contain detailed information about grave breaches and other violations of humanitarian law. Among these NGOs are Amnesty International, International Committee of the Red Cross, Medecins sans frontieres, Helsinki Watch, International League for Human Rights, Union for Peace and Humanitarian Aid to Bosnia and Herzegovina and "World Campaign to Save Humanity." See *Letter dated 9 February 1993 from the Secretary General Addressed to the President of the Security Council*, U.N. SCOR, 48th Year, Annex I, at 7-8 (Jan. 26, 1993), U.N. DOC.

against the government and armed forces of Serbia, are starkly reminiscent of charges made during the Nuremberg trials against major German war criminals, i.e., war crimes, crimes against the peace, and crimes against humanity.<sup>2</sup> Typifying these crimes in the Yugoslavian situation is the genocidal practice of "ethnic cleansing," by which mass numbers of Bosnian Muslims have been systematically driven from their homes, incarcerated in concentration camps, tortured, raped, and murdered.<sup>3</sup> While violations of the laws of war no doubt have occurred on all sides, it is the horrendous atrocities by Serbian forces associated with ethnic cleansing that have propelled international humanitarian concern to the forefront of these conflicts.

On May 25, 1993, the U.N. Security Council approved the establishment of a special international tribunal for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.<sup>4</sup> War crimes trial proceedings are therefore likely to be brought against certain persons in Yugoslavia's successor governments and their armed forces, as well as civilians. This article aims to accomplish three purposes: First, it examines the legal scope and juridical underpinnings for those criminal proceedings as fixed in the Nuremberg Precedent (i.e., the principles of international humanitarian law that were formulated and carried out by the Nuremberg Tribunal). In this way, the range of relevant law can be weighed within the context of humanitarian considerations. Second, it analyzes the nature and scope of re-

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S/25274 (1993) [hereinafter *Commission of Experts Report*]. See also Theodor Meron, *The Case for War Crimes Trials in Yugoslavia*, FOREIGN AFF., Summer 1993, at 122.

2. See generally Benjamin B. Ferencz, *The Nuremberg Precedent and the Prosecution of State-Sponsored Mass Murder*, 11 N.Y. L. SCH. J. INT'L & COMP. L. 325 (1990); Steven Fogelson, *Nuremberg Legacy*, 63 S. CAL. L. REV. 870 (1990); and ROBERT JACKSON THE NUREMBERG CASE (1947).

3. In his third report to the U.N. General Assembly and Security Council, the Special Rapporteur for Human Rights defined the odious notion of "ethnic cleansing" as "the elimination by the ethnic group exercising control over a given territory of members of other ethnic groups." Report on the situation of human rights in the territory of the former Yugoslavia prepared by Mr. Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights, pursuant to paragraph 15 of Commission resolution 1992/S-1/1 and Economic and Social Council decision 1992/305, in *Human Rights Questions: Human Rights Situations and Reports of the Special Rapporteurs and Representatives*, U.N. GAOR, 47th Sess., Annex I, Agenda Item 97(c), U.N. DOC. A/47/666, S/24809 (1992). "Ethnic cleansing" involves violations of international humanitarian law because of the intentional methods used in its perpetration, which include, *inter alia*, threats, harassment, and intimidation; shooting or using explosives against homes, shops, and places of business; destruction of places of worship and cultural institutions; forcible transfer and relocation of populations; summary executions; committing torture, rape, and mutilation of corpses; disregard for the sick and injured; and targeting areas of civilian activity or residence. *Id.* See Andrew Bell-Fialkoff, *A Brief History of Ethnic Cleansing*, FOREIGN AFF., Summer 1993, at 110, 116-21.

4. U.N. DOC. S/RES/827 (1993).

ported ongoing violations of humanitarian law in Bosnia to determine whether sufficient evidence exists to proceed with international measures to remedy the situation. Third, the article assesses the progressive efforts by the international community, particularly through the United Nations, to halt atrocities being perpetrated in Bosnia and to move toward a special war crimes tribunal for prosecuting alleged perpetrators. The intent here is neither to accuse nor indict; rather, it is to evaluate the prospects for and direction of such war criminal proceedings. Finally, it examines some realistic conclusions about the feasibility of applying the Nuremberg Precedent further in the so-called New World Order.

## II. DIMENSIONS OF THE NUREMBERG PRECEDENT

The horrendous violations of the laws of war by the Axis powers during World War II prompted demands for effective postwar punishment of those individuals responsible. On August 8, 1945, the governments of the United States, United Kingdom, France, and the Soviet Union concluded in London the Agreement for the Prosecution and Punishment of the Major War Criminals of the European War Axis.<sup>5</sup> This instrument contained details of and the Charter for the establishment of an International Military Tribunal.<sup>6</sup>

The Nuremberg Tribunal marked the first time that adjudication was convened pursuant to an international prescription defining particular crimes liable for prosecution. The fact that German high officials were given fair trials in itself was no small achievement, as it demonstrated respect for the law contained in that Charter. That respect was further evidenced by the establishment of the International Military Tribunal for the just and prompt trial of alleged war criminals.<sup>7</sup>

Key among the Nuremberg Charter's central provisions was Article 6, which defined the jurisdiction of the court:

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

(a) Crimes against the Peace: Namely, planning, preparation, initiation, or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the

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5. *Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, Charter of the International Tribunal*, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279. [hereinafter *London Charter*]. See also 13 DEPT OF STATE BULL. 222 (1945).

6. 13 DEPT OF STATE BULL., *supra* note 5, at 223.

7. See generally M. Cherif Bassiouni, *Nuremberg 40 Years After: An Introduction*, 18 CASE W. RES. J. INT'L L. 261 (1986).

foregoing;

(b) War crimes: Namely, violations of the laws or customs of war. Such violations shall include, but shall not be limited to, murder, ill-treatment or deportation to slave labor or from any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, town or villages, or devastation not justified by military necessity;

(c) Crimes against Humanity: Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan . . . .<sup>8</sup>

The body of modern international humanitarian law has been constructed on this foundation of criminal jurisdiction. Regarding crimes against the peace, contemporary international law clearly asserts that launching and waging a war of aggression is unlawful. The critical point here turns on the presumption that individual responsibility is paramount. Planning, preparing, and carrying out a war of aggression is done by people in one state against the people in some other state. Crimes against international law are committed by persons, not by abstract polities called states. Only by punishing individuals who commit such crimes can tenets of international humanitarian law actually be enforced.

War crimes are multiple in character and are defined as acts that violate the law of armed conflict — i.e., the rules established by customary law and conventional international law regulating the conduct of warfare and that have been designated as war crimes.<sup>9</sup> It is impor-

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8. *London Charter*, *supra* note 5, art. VI.

9. Annotated Supplement to the Commander's Handbook on the Law of Naval Operations, NWP 9 (REV.A/FMFM 1-10) 6-27 (1989). The following acts are considered representative of war crimes: (1) Offenses against prisoners of war, including killing without just cause, torture or inhuman treatment; unhealthy, dangerous, or otherwise prohibited labor; infringement of religious rights; and denial of fair trial for offenses; (2) offenses against civilian inhabitants of occupied territory, including killing without just cause, torture or inhuman treatment, forced labor, deportation, infringement of religious rights, and denial of fair trial for offenses; (3) offenses against the sick and wounded, including killing, wounding, or mistreating enemy forces disabled by sickness or wounds; (4) denial of quarter (i.e., denial of the clemency of not killing a defeated enemy) and offenses against combatants who have laid down their arms and have surrendered; (5) offenses against the survivors of ships

tant to realize that the laws of war embody rules of international law with which belligerents have agreed to comply should hostilities break out. Such laws involve specified mutual legal obligations and duties pertaining to warfare. The right of a belligerent to punish persons who violate the laws and customs of war as war criminals is a well-recognized principle of international law.

War crimes must be distinguished from "crimes against the peace" and "crimes against humanity." While the distinction between crimes against the peace and war crimes is not overly difficult, the distinction between war crimes and crimes against humanity appears more problematic. In general, crimes against humanity constitute offenses against the human rights of individuals perpetrated in a pervasive, systematic manner. Isolated offenses are excluded from crimes against humanity, and proof must confirm that acts alleged to be crimes against humanity resulted from premeditated, systematic governmental policies.<sup>10</sup> Significantly, acts constituting war crimes may be committed by members of the armed forces of belligerent states or by individuals belonging to the civilian population.<sup>11</sup>

Crimes against humanity come in two general varieties. One concerns the execution type of crime, which includes acts such as murder, extermination, enslavement, deportation and the like. The second pertains to the persecution type of crimes, which include acts committed on racial, religious, or political grounds. Both groups of crimes against humanity are committed against civilian populations. In this connection, isolated offenses fall outside the scope of crimes against humanity. Authoritative, systematic, mass action is necessary to pervert the common crime, punishable solely under municipal law, into a crime against humanity that generates the concern of international law. Such crimes by their sheer magnitude and savagery shock the conscience of humankind.<sup>12</sup>

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and aircraft lost at seas, including killing, wounding, or mistreating the shipwrecked; and failing to provide for the safety of survivors as military circumstances permit; (6) wanton destruction of cities, towns, and villages or devastation not justified by the requirements of military operations; and bombardment, the sole purpose of which is to attack and terrorize the civilian population; (7) deliberate attack upon medical facilities, hospital ships, medical aircraft, medical vehicles or medical personnel; (8) plunder and pillage of public or private property; (9) mutilation or other mistreatment of the dead; (10) use of prohibited arms or ammunition; (11) misuse, abuse, or firing on flags of truce or on the Red Cross device, and similar protective emblems, signs, and signals; (12) treacherous request for quarter (i.e., feigning surrender in order to gain a military advantage). *Id.* at 6-32-6-34.

10. *Id.* at 6-28. Victims of crimes against humanity encompass a wider range of persons than those who might be made the objects of war crimes. In addition, victims may include nationals of the state committing the offense, as well as stateless persons. *Id.*

11. *Commission of Experts Report, supra* note 1, at 15.

12. See generally W.J. BOSCH, JUDGMENT ON NUREMBERG: AMERICAN ATTITUDES TOWARD THE MAJOR GERMAN WAR CRIME TRIALS (1970); CHARLES W. ALEXANDER &

A cardinal principle emerging from the Nuremberg Precedent asserts that the rights of humanity should prevail over the province of municipal law. In a real sense, crimes against humanity have been made liable to prosecution through an international tribunal because the heinous nature of those crimes offends humanity itself.<sup>13</sup> Similarly, such crimes can be reasonably viewed as threats to world peace since their ramifications might well give rise to transnational conflict. As a consequence, the precept that crimes against humanity—given that they so egregiously contravene standards of civilized nations—could be made subject to the jurisdiction of an international tribunal furnished a notably progressive development toward the codification of international humanitarian law.<sup>14</sup>

A second core principle stemming from the Nuremberg Precedent holds that individuals have international duties that go beyond national obligations set by domestic governments.<sup>15</sup> Irrespective of whether an individual is a private citizen or government official, that person is subject to punishment under international law.<sup>16</sup> To be sure, this principle poses challenges for the state centric system in at least two ways. First, if a state's nationals are accused of war crimes, that state may be bound to relinquish jurisdiction over them to international jurisdiction.<sup>17</sup> As a second and resultant corollary, the state's sovereignty is made more circumscribed by the demands of international law.<sup>18</sup> The use of force by governments within states, as well as that between them, has now become subject to centralized international legal control. The international community has clearly come to accept a special legal regime for governing the actions of states and individuals during armed conflict.<sup>19</sup> Nuremberg represented an early effort at conscientiously designing the procedures and norms of this regime.

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ANNE KEESHAN, *JUSTICE AT NUREMBERG* (1946); and ROBERT K. WOETZEL, *THE NUREMBERG TRIALS AND INTERNATIONAL LAW* (1962).

13. Diane Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L. J. 2537, 2556 (1991). See also Whitney R. Harris, *A Call for An International War Crimes Court: Learning from Nuremberg*, 23 U. TOL. L. REV. 229, 243 (1992).

14. See generally Louis Rene Beres, *The United States Should Take the Lead in Preparing International Legal Machinery for the Prosecution of Iraqi Crimes*, 31 VA. J. INT'L L. 381 (1991).

15. Matthew Lippman, *Civil Resistance: The Dictates of Conscience and International Law Versus the American Judiciary*, 6 FLA. J. INT'L L. 5, 32 (1991).

16. Steven Fogelson, *The Nuremberg Legacy: An Unfulfilled Promise*, 63 S. CAL. L. REV. 833, 870 (1990). See also *Principles of International Cooperation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity*, G.A. Res. 3074, U.N. DOC. A/9030 (1973).

17. *Measures to Deal with International Crimes*, in UNITED NATIONS ACTIONS IN THE FIELD OF HUMAN RIGHTS 244 (1983).

18. RICHARD FALK, *LEGAL ORDER IN A VIOLENT WORLD* 159 (1968).

19. See generally JEAN PICTET, *DEVELOPMENT AND PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW* (1985) and JEAN PICTET, *INTERNATIONAL DIMENSIONS OF HUMANITARIAN LAW* (1988).

Related to individual duty and war crimes are the twin concepts of command responsibility and superior orders. The Nuremberg experience firmly established the principle that a person who gives an order to commit a war crime against humanity and the person who carries it out are equally guilty of the offense. In fact, a responsible commander could be subject to trial even if he did not order such crimes but knew or should have known of the unlawful conduct and failed to take reasonable actions to prevent, suppress, and punish it.<sup>20</sup> This principle applies both to military superiors of regular or irregular armed forces and to civilian authorities. Similarly, the fact that an individual commits a war crime under orders from his military or civilian superior does not relieve him of responsibility under international law. Responsibility is established when the order given is manifestly unlawful and the person receiving the order knows (or should know) of its unlawful character under international law.<sup>21</sup>

A third principle associated with the Nuremberg Precedent is contained in the definition of war crimes as it prohibits the wanton destruction of cities, towns, or villages. The Nuremberg definition essentially mandates that violence and devastation of civilian areas not justified by military necessity are forbidden.<sup>22</sup> To be sure, the International Military Tribunal went to great lengths to demonstrate that actions producing unnecessary damage and destruction were already war crimes, and were therefore unlawful. The Tribunal eventually held liable those persons who intended to perform such unlawful acts.<sup>23</sup>

The normative implications of the Nuremberg Precedent are real and profound. The Tribunal at Nuremberg embodied the international community's resolve to ensure that persons responsible for heinous acts systematically perpetrated as part of a mass campaign of discrimination and persecution must not go unpunished. Such a conviction has roots in the 1907 Hague Convention, which refers to the laws of humanity as principles governing the conduct of international war.<sup>24</sup> A

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20. See *The High Command Case (The Trial of Wilhelm von Leeb)*, 12 L. Rep. of Trials of War Criminals 1, 71 (1949). See generally William Hayes Parks, *Command Responsibility for War Crimes*, 62 MIL. L. REV. 1 (1973).

21. Annotated Supplement to the Commander's Handbook, *supra* note 9, at 6-39. A situation involving superior orders may be considered in mitigation of punishment, however. *Id.* See generally L.C. GREEN, *SUPERIOR ORDERS IN NATIONAL AND INTERNATIONAL LAW* (1976).

22. Richard A. Wasserstrom, *Individual Responsibility in Warfare*, in *LAW AND RESPONSIBILITY IN WARFARE* 194, 195 (Peter D. Trooboff ed., 1975).

23. *Id.* at 207-208.

24. Hague Convention No. IV Respecting the Laws and Customs of War on Land, October 18, 1907, 36 Stat. 2277 [hereinafter *Hague Convention IV*]. The famous de Martens clause in the Preamble to this instrument makes clear the broad, evolutionary scope for the positive law of war. It provides that

Until a more complete code of the laws of war has been issued, the High Contracting parties deem it expedient to declare that, in cases not



critical theme for the viability of international humanitarian law consequently emerges: emphasis on the permissibility of international jurisdiction underscores the firm insistence of international law that these crimes not go unpunished.<sup>25</sup>

The Nuremberg Tribunal represented the first major attempt to use the rule of law to protect the rights of all persons and foster a more peaceful, humane, and secure world.<sup>26</sup> That experience also contributed significantly in propelling the drafting of the four 1949 Geneva Conventions.<sup>27</sup> Especially salient is Article 3, common to each of these conventions, that guarantees humane treatment for persons taking no active part in the hostilities. This provision stipulates that

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of the armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular humiliating and degrading treatment;

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included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and from the dictates of the public conscience.

*Id.* at Preamble.

25. The case for international jurisdiction over violations of international humanitarian law is facilitated by the permissible application of universal jurisdiction to such offenders. See M. CHERIF BASSIOUNI, *INTERNATIONAL EXTRADITION IN U.S. LAW AND PRACTICE* (vol. II, ch. 6, 1983); *RESTATEMENT OF THE FOREIGN RELATIONS OF THE UNITED STATES*, §§ 402-404 (1987).

26. Lippman, *supra* note 15, at 48.

27. Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. No. 31; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 267 [hereinafter 1949 Geneva Conventions].

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be cared for. An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.<sup>28</sup>

The decision to try the crimes set out in the Nuremberg Charter grew out of its reliance on the Kellogg-Briand Pact, which renounced war as an instrument of national policy.<sup>29</sup> Also, carrying out the Nuremberg Charter's mandate clearly necessitated difficult legal judgments, especially concerning legal questions of precedent, jurisdiction, and scope. Once made, however, these legal judgments formed the bedrock on which modern international humanitarian law is grounded.<sup>30</sup>

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28. *Id.* art. 3.

29. Kellogg-Briand Pact, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57. As asserted in Article I of this instrument, "The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another." *Id.* art. I.

30. On November 21, 1947, the United Nations General Assembly adopted Resolution 177 (II), which affirmed "the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal." As subsequently formulated by the U.N. International Law Commission, the text of these principles are as follows:

Principle I. Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment.

Principle II. The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.

Principle III. The fact that a person who committed an act which constitutes a crime under international law acted as a Head of State or responsible Government official does not relieve him from responsibility under international law.

Principle IV. The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him.

Principle V. Any person charged with a crime under international law has the right to a fair trial on the facts and law.

Principle VI. The crimes hereinafter set out are punishable as crimes under international law: [crimes against the peace, war crimes and crimes against humanity are thereafter defined substantially as they appear in Article 6 of the Charter of the International Military Tribunal at Nuremberg].

It is this same humanitarian law that must be applied to the armed conflicts in the territory of the former Yugoslavia.

### III. NUREMBERG AND THE TERRITORY OF THE FORMER YUGOSLAVIA

The war in the former Yugoslavia, especially in Bosnia and Herzegovina, remains a violent armed conflict that has generated serious political, military, and legal implications throughout the international community. In the process, the tragedy of that war proffers the first realistic opportunity since the Nuremberg experience to prosecute persons responsible for committing grave breaches of international humanitarian law.<sup>31</sup>

#### A. *The Legal Issues*

##### 1. International Humanitarian Law

The armed conflict in the territory of the former Yugoslavia has generated a number of legal issues involving facets of "international humanitarian law." But how is international humanitarian law to be defined? As applied to the conflict in former Yugoslavia, such law generally refers to the "rules of international law applicable in armed conflict."<sup>32</sup> Some of these rules are set out in the four 1949 Geneva Conventions and the 1977 Additional Protocols to the Geneva Conventions,<sup>33</sup> to which the former Yugoslavia was a party. The Federal Re-

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Principle VII. Complicity in the commission of a crime against the peace, a war crime, or a crime against humanity as set forth in Principle VI is a crime under international law.

*Report of the International Law Commission Covering its Second Session*, U.N. GAOR, 5th sess., pt. 1, Supp. No. 12, U.N. Doc. A/1316, at 11-14 (1950).

31. At the conclusion of the Persian Gulf War in early 1991 serious suggestions were made that war crimes trials of Iraqi soldiers and governmental officials were in order, but neither formal proceedings nor a tribunal was ever promulgated. For discussion of the prospects of Iraqi war crimes, see Jordan J. Paust, *Suing Saddam: Private Remedies for War Crimes and Hostage-Taking*, 31 VA. J. INT'L L. 351 (1991); Beres, *supra* note 14; and John Norton Moore, *War Crimes and the Rule of Law in the Gulf Crisis*, 31 VA. J. INT'L L. 403 (1991).

32. Protocol I, Additional to the Geneva Conventions of 12 August 1949, relating to the Protection of Victims in International Armed Conflict, art. 2, June 8, 1977, 1125 U.N.T.S. 3, 16 I.L.M. 1399 (1977) [hereinafter Protocol I]. For the fundamental principles of modern humanitarian law, see Lippman *supra* note 15. For a general discussion of international humanitarian law, see PICTET, *supra* note 19.

33. For the Geneva Conventions, see note 27 *supra*. In Protocol I, specific provisions of humanitarian law are contained in two categories of acts designated as "grave breaches" of that instrument. The first category requires that both willfulness and death or serious injury to body or health be caused, and includes the following acts as grave breaches:

(a) making the civilian population or individual citizens the object of attack;

(b) launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause extensive loss of life, injury to civilians and damage to civilian ob-

public of Yugoslavia, said to be the successor to that state, is bound by these treaties.<sup>34</sup> Also legally significant, Croatia, Slovenia, Bosnia-Herzegovina have declared themselves likewise bound.<sup>35</sup>

Other international instruments also hold specific relevance to the situation in the territory of the former Yugoslavia, given that the violence there has risen to the level of an armed conflict. International agreements that specifically relate to the conduct of hostilities and the treatment of local persons include the 1907 Hague Convention IV and

jects, . . . ;

(c) launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause extensive loss of life, injury to civilians, or damage to civilian objects, . . . ;

(d) making non-defended localities and demilitarized zones the object of attack;

(e) making a person the object of attack in the knowledge that he is *hors de combat*;

(f) the perfidious use, in violation of Article 37, of the distinctive emblem of the red cross, red crescent or red lion and sun, or other protective sign recognized by the Conventions or this Protocol.

Protocol I, *supra* note 32, art. 85(3). A second category of grave breaches contained in Protocol I requires only willfulness to be an offense and includes the following:

(a) the transfer by the occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory, in violation of Article 49 of the Fourth Convention;

(b) unjustifiable delay in the repatriation of prisoners of war or civilians;

(c) practices of *apartheid* and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination;

(d) making the clearly recognized historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given by special arrangement . . . the object of attack, causing as a result extensive destruction thereof . . . ; and

(e) depriving a person protected by the Conventions or referred to in paragraph 2 of this article of the rights of fair and regular trial.

*Id.* art. 85(4).

34. *Commission of Experts Report*, *supra* note 1, at 13.

35. In the 1992 *Programme of Action* concluded at the London International Conference, these governments pledged to abide by the provision that "all parties to the [Yugoslav] conflict are bound to comply with their obligations under the International Humanitarian Law and in particular the Geneva Conventions of 1949 and the Additional Protocols thereto, and that persons who commit or order the commission of grave breaches are individually responsible." United Nations, General Assembly, Security Council, The Situation of human rights in the territory of the former Yugoslavia; Report on the situation of human rights in the territory of the former Yugoslavia submitted by Mr. Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights, pursuant to Commission resolution 1992/S-1/1 of 14 August 1992, 48th Sess., Annex III, U.N. Doc. A/48 - S/25341 at 78 (1992) [hereinafter 1992 *Programme of Action*].

the Regulations on the Laws and Customs of War on Land;<sup>36</sup> the 1948 Convention on the Prevention and Punishment of the Crime of Genocide;<sup>37</sup> the Convention for the Protection of Cultural Property in the Event of Armed Conflict;<sup>38</sup> and the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which may be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, and Protocols.<sup>39</sup> Relevant human rights laws are also applicable to this conflict in the Balkans.<sup>40</sup>

## 2. Legal Status of the Conflict

Another legal consideration is the status of the conflict. Do the various armed conflicts occurring in the territory of the former Yugoslavia qualify as international armed conflicts entailing belligerent hostilities between two or more states? Or do they more closely resemble non-international (i.e., internal) armed conflicts taking place within the territory of a single state?

The character and complexity of the regional situation make such a determination difficult at best. At times, armed conflict has occurred involving the armed forces of one state in the territory of another state. But at many other times, indigenous ethnic groups (primarily Serbs) have operated as irregular guerrilla forces against other ethnic groups (primarily Muslims) within the territory of a single state (mostly in Bosnia-Herzegovina). The status of the conflict is relevant since it may determine which treaties apply to what circumstances, when and where. No easy solution is available. It is important to realize, however, that both the 1949 Geneva Conventions and the 1954 Hague Convention present the opportunity for parties involved in an internal armed conflict to negotiate special arrangements that would

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36. Hague Convention IV, *supra* note 24.

37. Dec. 9, 1948, 78 U.N.T.S. 277. For discussion, see Christopher C. Joyner, *The United States and the Genocide Convention*, 27 IND. INT'L & COMP. L. REV. 441 (1987).

38. Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240-88.

39. U.N. DOC. A/CONF. 95/15 and Corr. 1 - 5 (1980).

40. Among the human rights instruments offering protection to persons affected by the armed conflict in the territory of the former Yugoslavia are the Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 and 1967 Protocol Relating to the Status of Refugees, Nov. 18, 1966, 606 U.N.T.S. 268, 19 U.S.T. 6223, T.I.A.S. 6577; Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, G.A. Res. 34/180, 34 U.N. GAOR, Supp. No. 46 at 193 (1979); Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Dec. 10, 1984, G.A. Res. 39/46, 39 U.N. GAOR, Supp. No. 51, at 197 (1984); International Convention on the Elimination of all Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195, 5 I.L.M. 352; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, G.A. Res. 2200 (XXI), 21 U.N. GAOR, Supp. No. 16, at 49, U.N. DOC. A/6316 (1967); and International Covenant on Civil and Political Rights, Dec. 16, 1966, G.A. Res. 2200 (XXI), 21 U.N. GAOR, Supp. No. 16, at 52, U.N. DOC. A/6316 (1967).

permit all or part of these conventions to be activated.<sup>41</sup> The parties involved in these armed conflicts in the Balkans have concluded such a series of special agreements.<sup>42</sup>

Considering the shifting character and complicated nature of the situation — as well as the agreements made among the respective governments on humanitarian issues — the most appropriate approach would seem to be to apply the law for international armed conflicts to all warfare in the territory of the former Yugoslavia. Greater legal protection under the laws relating to armed conflict would be afforded to more persons in all the afflicted states without the complications of reviewing each incident of violence to determine if it qualified for national or international status. Potential excuses premised on national sovereignty would be subsumed to legal conditions implicating international responsibility.

### 3. Grave Breaches of International Humanitarian Law

#### a. Background

Conflict in the former Yugoslavia began shortly after Croatia and Slovenia formally declared their independence on June 25, 1991.<sup>43</sup> In Croatia, fighting broke out between Croats and ethnic Serbs. Serbia sent arms and supplies to ethnic Serbian rebels in Croatia, leading to numerous clashes between Croatian forces and Yugoslavian army units with their Serbian supporters.<sup>44</sup>

On October 15, 1991, the parliament of Bosnia-Herzegovina adopted a declaration of sovereignty<sup>45</sup> and on February 29, 1992 a referendum for independence was passed.<sup>46</sup> Indigenous Serbs, who account for some thirty one percent of Bosnia's population and who opposed the referendum, immediately launched attacks aimed at seizing Bosnian territory and dissuading the international community from recognizing the independence of the new state.<sup>47</sup> The republics of Serbia and Montenegro proclaimed a new "Federal Republic of Yugoslavia" on April 17, 1992.<sup>48</sup> Fierce fighting persisted throughout Bosnia-

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41. See 1949 Geneva Conventions, *supra* note 27, art. 3; Convention for the Protection of Cultural Property, *supra* note 38, art. 19.

42. 1992 Programme of Action, *supra* note 35.

43. See Chuck Sudetic, *2 Yugoslav States Vote Independence to Press Demands*, N.Y. TIMES, June 26, 1991, at A1; Chuck Sudetic, *Croatia Says Call-Up is Next Move*, N.Y. TIMES, Aug. 28, 1991, at A3.

44. *More Yugoslavs Roll Into Croatia; Civilian Leader Ponders His Role*, N.Y. TIMES, Aug. 19, 1991, at A3.

45. Francis X. Clines, *Serbia and Croatia Agree to Another Cease-Fire*, N.Y. TIMES, Oct. 16, 1991, at A10.

46. Chuck Sudetic, *Turnout in Bosnia Signals Independence*, N.Y. TIMES, Mar. 2, 1992, at A3.

47. Chuck Sudetic, *Rebel Serbs Disrupt Travel Into Yugoslavia Republic*, N.Y. TIMES, Mar. 3, 1992, at A9.

48. John F. Burns, *Confirming Split, Last 2 Republics Proclaim a Small New*

Herzegovina during the spring and the summer of 1992, as Serbs massacred thousands of Bosnians, many of them civilians. Throughout the conflict, Serbia continued to furnish arms and military supplies to ethnic Serb guerrillas fighting in Bosnia.

In February 1992, the United Nations Security Council responded to the situation by adopting Resolution 721 (1992), which authorized sending a special peacekeeping force, the United Nations Protection Force (UNPROFOR), to Bosnia.<sup>49</sup> In mid-1994, UNPROFOR remained in place, comprised of some 23,200 troops, mostly from France and Great Britain.

#### b. Commission on Human Rights

The violence in Bosnia and Croatia has escalated to the level of a full-scale regional conflict, bringing with it widespread violations of international humanitarian law, euphemistically described as "ethnic cleansing." The severity of the conflict was pushed to the forefront of international attention when the Commission on Human Rights convened the first exceptional session in its history on August 13, 1992, to "discuss reports of detention camps, arbitrary imprisonments and executions, and destruction of homes and villages in the former Yugoslavia."<sup>50</sup>

This extraordinary session of the Commission on Human Rights was prompted by disturbing reports that many governments had received concerning gross abuses of the human rights of Bosnian Muslims by Serbs in direct contravention of international law. Most appalling were reports of deliberate targeting of civilians, a grave breach of the humanitarian law as set forth in Article 3 of the 1949 Geneva Conventions.<sup>51</sup> The entire Bosnian population was suffering from brutal Serbian pressures designed to create a Greater Serbia through the policy of "ethnic cleansing."

Since his appointment by the Commission on Human Rights in August 1992, the Special Rapporteur has issued four reports on the human rights situation in the former Yugoslavia to the General Assembly and to the Security Council.<sup>52</sup> These reports contain substan-

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*Yugoslavia*, N.Y. TIMES, Apr. 28, 1992, at A1.

49. U.N. Doc. S/RES/721 (1992).

50. United Nations Information Service, "Human Rights Commission Opens Exceptional Session on Situation in Yugoslavia," Press Release HR/3139, Aug. 13, 1992, at 1.

51. See generally 1949 Geneva Conventions, *supra* note 27.

52. U.N. ESCOR, Commission on Human Rights, Letter dated 5 August 1992 from the permanent representative of the U.S. of America to the United Nations Office at Geneva Addressed to the Under-Secretary General for Human Rights, Report on the situation of human rights in the territory of the former Yugoslavia submitted by Mr. Tadeusz Mazowiecki, Special Rapporteur of the Commission of Human

tial evidence detailing pervasive violations of international humanitarian law, attributed mainly to the Serbian policies of "ethnic cleansing."

In his initial report of August 28, 1992, the Rapporteur indicated that ethnic cleansing has been pursued openly throughout territory in Bosnia-Herzegovina that was controlled by ethnic Serbs.<sup>53</sup> In these areas, grave breaches of international humanitarian law by local Serbs included a raft of offenses: nighttime shooting at homes belonging to other ethnic groups; forced displacement of Muslims from their homes; armed attacks on churches and mosques; and the cutting off of food aid and other supplies, including the use of direct attacks on humanitarian aid personnel.<sup>54</sup> Among the egregious violations of international humanitarian law reported were the shelling of civilian population centers, the shooting of innocent civilians by snipers, and the detention of civilians as a means to pressure them to leave the territory.<sup>55</sup> Evidence also revealed that untold numbers of Muslim prisoners in Bosnia-Herzegovina died of torture and systematic execution during 1992. Some three thousand disappearances were reported to have occurred in the aftermath of the fall of the Bosnia city of Vukovar.<sup>56</sup>

The second report by the Rapporteur was based on a visit to Bosnia during October 1992.<sup>57</sup> Its conclusions were no less alarming than those of the first investigation: serious violations of human rights had intensified, and the indigenous Muslim population had clearly become the principal victims of aggression.<sup>58</sup> The situation of displaced

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Rights, pursuant to paragraph 14 of Commission Resolution 1992/S-1/1 of 14 August 1992 [hereinafter First Report]; U.N. ESCOR, Commission of Human Rights, Letter dated 5 Aug. 1992 from the permanent representative of the U.S. of America to the United Nations Office at Geneva Addressed to the Under-Secretary General for Human Rights, Report on the situation of human rights in the territory of the former Yugoslavia submitted by Mr. Tadeusz Mazowiecki, Special Rapporteur of the Commission of Human Rights, pursuant to paragraph 15 of the Commission Resolution 1992/S-1/1 of 14 August 1992, U.N. DOC. E/CN. 4/1992/S-1/10 [hereinafter Second Report]; U.N. GAOR, 47th Sess., Situation of human rights in the territory of the former Yugoslavia; Report on the situation of human rights in the territory of the former Yugoslavia prepared by Mr. Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights, pursuant to paragraph 15 of Commission Resolution 1992/S-1/1 and Economic and Social Council decision 1992/305, U.N. DOC. A/47/666-S/24809 (1992) [hereinafter Third Report]; U.N. ESCOR, Commission on Human Rights, 49th Sess., Situation of human rights in the territory of the former Yugoslavia, Report on the situation of human rights in the territory of the former Yugoslavia prepared by Mr. Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights, pursuant to Commission Resolution 1992/S-1/1 of 14 August 1992, U.N. DOC. E/CN. 4/1993/50 [hereinafter Fourth Report].

53. First Report, *supra* note 52, at 2.

54. *Id.* at 2-4.

55. *Id.* at 3-5.

56. *Id.* at 9, para. 41.

57. Second Report, *supra* note 52.

58. The Rapporteur averred:

Grave and massive violations of human rights continue to occur in the



persons was becoming increasingly serious, particularly in Travnik where the plight of some fourteen thousand refugees was being handled by local authorities.<sup>59</sup> Before their arrival in Travnik, many of these refugees had been taken to the front battle lines and subjected to beatings, robbery, rape, and sometimes shooting.<sup>60</sup> Brutal methods associated with ethnic cleansing had occurred in the Bosnian towns of Pijavija, Prikepolje, and Priboj.<sup>61</sup>

The Third Report of the Special Rapporteur was issued on November 17, 1992 and specifically highlights violations of the various parties' legal obligations under modern international humanitarian law.<sup>62</sup> In areas under Serbian control, the multifaceted process of ethnic cleansing was being systematically practiced to drive out Bosnian Muslims from their homes, including widespread use of torture, artillery shelling of civilian neighborhoods, and summary mass executions — some of which claimed as many as five thousand victims.<sup>63</sup> The Rapporteur asserted that ethnic cleansing was clearly following the political objective by Serbian nationalists to gain control over all territories inhabited by significant numbers of Serbs, with the ultimate goal of incorporating Serbian-occupied areas of Bosnia-Herzegovina into a "Greater Serbia."<sup>64</sup> The Third Report also underscored the humanitarian crisis in the region. Out of Bosnia-Herzegovina's population of four million, at least 1.5 million have become refugees and displaced persons, with seventy five percent of the latter being children and the elderly.<sup>65</sup>

The Fourth Report by the Special Rapporteur was the most comprehensive and concluded that massive violations of human rights and international humanitarian law are not simply features of armed conflict in Bosnia-Herzegovina. Rather, such heinous means were being used systematically and deliberately by Serbs to achieve ethnically homogenous areas.<sup>66</sup> Ethnic cleansing had clearly been successful in

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territory of the former Yugoslavia. The military conflict in Bosnia and Herzegovina, which is aimed at "ethnic cleansing", remains a matter of particular and most urgent concern . . . . [H]uman rights violations continue to be committed in Bosnia and Herzegovina and in certain respects have intensified . . . . As indicated in the first report, the Muslim population are the principal victims and are virtually threatened with extermination."

*Id.* at 2.

59. *Id.* at 3.

60. *Id.*

61. To escape terrorist bombings and burning by paramilitary groups, an estimated 70,000 Muslims were reported to have fled this region since June of 1991. *Id.* at 6.

62. Third Report, *supra* note 52.

63. *Id.* at 8.

64. *Id.* at 6-7.

65. *Id.* at 20.

66. Fourth Report, *supra* note 52, at 6.

obtaining its objectives: nearly two-thirds of Bosnia had been put under Serbian control.<sup>67</sup> Summary executions, mass arrests and arbitrary detention, widespread rape, deprivation of children, forced transfer of populations, attacks on civilian population centers, wanton destruction of property, and harassment of humanitarian relief convoys have all been used by Serbs against Bosnians to achieve "ethnic cleansing" in the region.<sup>68</sup>

In Croatia, the Fourth Report indicated that discrimination had occurred against Serbian civilians, particularly as regards their citizenship and political rights.<sup>69</sup> In the Federal Republic of Yugoslavia, the situation of human rights in Kosovo had deteriorated as discrimination was intensifying by Serbs against the Albanian minority.<sup>70</sup> As for the Republic of Slovenia, the main pressures have come with the influx of large numbers of refugees from Bosnia — at least 70,000 since June 1991.<sup>71</sup> Macedonia, thus far, has managed to avoid becoming embroiled in the military conflict, although nearly 32,000 refugees have fled there from Bosnia and Croatia.<sup>72</sup>

The conclusions of the Special Rapporteur are bold, stark, and troubling: ethnic cleansing violates fundamental principles of international humanitarian law; evidence of war crimes during the conflict in both Bosnia and Croatia is pervasive and growing; the rape of women, including minors, is widespread in both conflicts; and the "political and military leaders of the Bosnian Serbs bear the primary responsibility for the ethnic cleansing policy carried out there in total disregard of their obligations. However, with the prolongation of the conflict, more and more atrocities are being committed by other parties."<sup>73</sup>

### c. The Warburton Mission

The European Community sent an additional mission, headed by Dame Ann Warburton, to investigate the treatment of Muslim women in the former Yugoslavia. The mission spent two weeks in that territory — from December 18-24, 1992 and January 19-26, 1993 — and issued a report to the U.N. Secretary-General on February 3, 1993.<sup>74</sup> The findings of this mission are profoundly disturbing. On the basis of its investigations, the mission concluded that the rape of Muslim women has been perpetrated on a wide scale and in such a systematic,

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67. *Id.* at 7.

68. *Id.* at 6-24.

69. *Id.* at 26-30.

70. *Id.* at 34-39.

71. *Id.* at 45.

72. *Id.* at 47-53.

73. *Id.* at 55-56.

74. *European Community investigative mission into the treatment of Muslim women in the former Yugoslavia: Report to European Community Foreign Ministers*, U.N. Doc. S/25240, Annex I, at 2 (1993) [hereinafter *Warburton Mission Report*].

premeditated manner as to be considered part of an intentional war strategy. While the number of Muslim women raped during the conflict will likely never be precisely known, the mission estimated that the number of victims ranged between 10,000 and 60,000, with "the most reasoned estimates" put at around 20,000.<sup>75</sup> The mission was not able to gauge precisely how many women had become pregnant as a result of rape, but one estimate suggested a possible figure of 1,000.<sup>76</sup> Regarding the systematic nature of the rapes, the mission heard substantial and compelling testimony that "a repeated feature of Serbian attacks on Muslims towns and villages was the use of rape, often in public, or the threat of rape, as a weapon of war to force the population to leave their homes."<sup>77</sup> It became clear to the investigators that rape was being used as "part of a pattern of abuse, usually perpetrated with the conscious intention of demoralizing and terrorizing communities, driving them from their home regions and demonstrating the power of the invading forces."<sup>78</sup> The Warburton report concluded, therefore, that rape in Bosnia-Herzegovina was not incidental to the main purpose of the aggression. Rather, it was being perpetrated as a strategic purpose in itself. The type and scale of rapes reported to the mission clearly suggested a deliberate pattern.<sup>79</sup>

#### d. Conclusions

These abuses of human rights clearly constitute grave breaches of international humanitarian law. This conclusion is patently obvious as regards common Article 3 of the 1949 Geneva Conventions on the Laws of War, particularly as it relates to the Fourth Geneva Convention Relative to the Protection of Civilians in Time of War.<sup>80</sup> This provision protects the rights of civilians and others who are *hors de com-*

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75. The report goes on to assert that:

The enormity of the suffering being inflicted on the civilian population in this conflict defies expression. Indications are that at least some of the rapes have been committed in particularly sadistic ways, so as to inflict maximum humiliation on the victims, on their family and on the whole community. In many cases there seems little doubt that the intention is deliberately to make women pregnant and then to detain them until pregnancy is far enough advanced to make termination impossible, as an additional form of humiliation and constant reminder of the abuse done to them.

*Id.* at 5.

76. *Id.*

77. *Id.* at 6.

78. *Id.*

79. *Id.* Subsequent investigations by the United Nations confirmed the use of rape by the Serbs as a deliberate war weapon, but concluded there were only about 3000 victims. See Paul Lewis, *Rape Was Weapon of Serbs*, *U.N. Says*, *N.Y. TIMES*, Oct. 20, 1993, at A1.

80. 1949 Geneva Conventions, *supra* note 27. See also *supra* text accompanying note 28.

bat in times of internal conflict, and it specifically prohibits violence to life and person, the taking of hostages, inflicting degrading treatment on an individual and conducting summary executions. In the same connection, forced movements of civilian populations, in this case Bosnian Muslims, are generally prohibited under international humanitarian law as codified in Article 17 of the 1977 Protocol II to the Geneva Conventions.<sup>81</sup> That same instrument renders unlawful any acts of hostility directed against historic monuments or places of worship.<sup>82</sup>

It is also significant to realize that parties to the armed conflict in Bosnia and Herzegovina are liable for breaches of the *Programme of Action on Humanitarian Issues* adopted by them at London on August 27, 1992.<sup>83</sup> Under this agreement, the parties agreed to respect the 1949 Geneva Conventions on the Laws of War and its two protocols, as well as to hold responsible those persons who order or commit grave breaches of them.<sup>84</sup>

### B. United Nations' Reactions

It is noteworthy that world public opinion manifested itself in a principal organ of the United Nations, the Commission on Human Rights. Asserting the rule of law as the basis for their deliberations and decisions, the Commission demanded the cessation of these reported violations and in effect upheld the relevance and importance of international humanitarian law. The Commission in particular drew upon the 1977 Protocol I to the 1949 Geneva Conventions and recommended establishment of an International Humanitarian Fact-Finding Commission.<sup>85</sup>

The Security Council, concerned and alarmed over the increasing reports of mass killings and ethnic cleansing, requested the Secretary General to establish an impartial Commission of Experts to analyze such reports.<sup>86</sup> In formulating this commission to investigate crimes against the peace, crimes against humanity, and war crimes, the Security Council left open the possibility that the conclusions of this body might well constitute the basis for "recommendations for further appropriate steps."<sup>87</sup> This indeed proved to be the basis for creation of the Balkans war crimes panel approved by the Security Council to determine the liability of individuals accused of such crimes.

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81. Protocol Additional to the Geneva Conventions, 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977, 1125 U.N.T.S. 606, at art. 17.

82. *Id.* at art. 16.

83. See 1992 Programme of Action, *supra* note 35.

84. *Id.*

85. Commission on Human Rights, Resolution 1992/S-2 of Dec. 1, 1992.

86. U.N. Doc. S/RES/780 (1992).

87. *Id.*

The Security Council, by mandate of the U.N. Charter, plays the critical role in maintaining international peace and security. Regarding implementation of international humanitarian law for Bosnia-Herzegovina, the Security Council has undertaken considerable effort to demand respect for humanitarian law from all parties; to determine that certain acts constitute violations of that body of law; to condemn violations of certain humanitarian laws; and to request that governments take specific actions in reaction to those violations. The paramount realization becomes plain: the Security Council, as the principal U.N. organ endowed with the responsibility for maintaining peace (under Article 24 of the Charter), possesses the lawful capacity to demand that grave breaches of international humanitarian law cease.<sup>88</sup> This can be accomplished by determining the applicability of relevant humanitarian instruments and by informing the international community about the actual legal situation at issue.

This responsibility of the Security Council underpinned its creation of the Commission of Experts on October 6, 1992. The Council specifically referenced provisions of the 1949 Geneva Conventions and demanded that all parties "cease and desist from all breaches of international humanitarian law."<sup>89</sup> Significantly, persistence of such grave breaches would permit the Security Council to take further measures against these violations. This explains why the fact-finding missions of the Special Rapporteur of the Human Rights Commission, as well as investigations by the International Committee of the Red Cross, the Conference on European Cooperation and Security, Human Rights Watch (especially Helsinki Watch), Amnesty International, and other human rights organizations have served as impressive supplements for substantiating conclusions drawn by the Commission of Experts. Reports and data from all these groups furnished vital ingredients in the Security Council's deliberations.<sup>90</sup>

Credible enforcement measures encourage respect and confidence in institutions that contribute to participation of individuals in a rights-based community. When applied to the situation in Bosnia-Herzegovina, the sensible approach suggests that states and organizations should persist in their investigations of violations of human rights. The war crimes tribunal must be made to work to ensure that law upholds justice. The duty to investigate violations has been repeatedly stressed in international instruments, including the four 1949 Geneva Conventions,<sup>91</sup> the Genocide Convention,<sup>92</sup> the Convention Prohibiting Torture,<sup>93</sup> and the International Covenant on Civil and

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88. See *infra* text accompanying notes 99-100.

89. See U.N. DOC. S/RES/780, at para. 2 (1992).

90. See *Commission of Experts Report*, *supra* note 1.

91. See 1949 Geneva Conventions, *supra* note 27, arts. 52, 53, 132, 149.

92. Genocide Convention, *supra* note 37, art. VIII.

93. Convention Against Torture, *supra* note 40, art. XX.

Political Rights.<sup>94</sup> Furthermore, Article IV of the Genocide Convention, Article 6(b) of the London Charter (1945), and Principle VI of the Nuremberg Principles, adopted by General Assembly resolution 95(I) in December 1946, affirm that violation of these laws is punishable.

#### IV. THE INTERNATIONAL TRIBUNAL

On February 22, 1993, the Security Council unanimously adopted Resolution 808 (1993), which formally decided that an international tribunal should be established "for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991."<sup>95</sup> Three months later, on May 25, the Security Council adopted Resolution 827 (1993), formally establishing such a tribunal.<sup>96</sup> The creation of a tribunal to investigate and prosecute war crimes during the armed conflicts in the former Yugoslavia reaffirms the necessity of dealing with violations of humanitarian law and the laws of war — particularly crimes against civilians — and with individual penal liability of those responsible for such violations.

The traditional objection to an international war crimes court turned mainly on the presumption that such a tribunal would not be capable of applying international laws of war to individual persons. International law was deemed binding only on states *per se*, and hence only a particular state could punish an individual offender. The Nuremberg court and subsequent trial proceedings have rendered that argument moot. That objection has been overtaken by the principle that violations of the laws of war constitute both a national and an international crime and are therefore justiciable both in a national or international court. The new International Tribunal for dealing with war crimes in the former Yugoslavia reaffirms the international commitment to that principle.

##### A. *Legitimacy of an International Criminal Tribunal*

The legitimacy of creating an international tribunal for prosecuting serious violations of international humanitarian law in the territory of the former Yugoslavia is predicated on the principle of *nullum crimen sin lege*: there can be no punishment for a crime unless it has been *a priori* defined by law.<sup>97</sup> Justification for such a court has been

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94. Covenant on Civil and Political Rights, *supra* note 40, art. 41.

95. U.N. DOC. S/RES/808, at para. 1 (1993).

96. U.N. DOC. S/RES/827 (1993).

97. This criticism was leveled at the Nuremberg Trials, and in particular at the charges of crimes against humanity that did not formally exist until expressly defined in the Charter of the Military Tribunal. Even so, it is undeniable that most crimes against humanity were also war crimes, committed in violation of the law of belligerent occupation. See William V. O'Brien, *The Nuremberg Precedent and the*

fixed through the Nuremberg Precedent, indisputable norms of customary international law, various international treaties, and resolutions of the United Nations.

The legitimacy underpinning the International Tribunal for prosecuting war crimes in the former Yugoslavia will not be undercut by the stigma of an institution created to mete out victors' justice. Internationalization of the prosecution and trial for both victims and accused will work to ensure that impartial justice is rendered without interference by any of the affected principal governments. In order to guarantee such impartiality, the Tribunal is international in character, composition, and authority; it is endowed with multiple jurisdictions over actions, persons, places, and time; and it avoids being transformed into an unwieldy international bureaucracy.

At least three procedures for establishing the proposed tribunal were available to the international community. First, an international treaty might be concluded among concerned states. This was the course followed for the Nuremberg Tribunal, and this route has also been the means sought by the United Nations to establish a permanent international criminal court. Serious disadvantages, however, would likely encumber the treaty approach to creating an international Balkans tribunal. Not least among these are difficulties associated with concluding multilateral negotiations and the prolonged time required for governments to complete the signature, ratification, and entry into force of the agreement. Even then, some states whose participation is indispensable (e.g., the Federal Republic of Yugoslavia and Russia) might decide not to participate in the treaty arrangement.

A second approach would be for the United Nations itself to establish the tribunal. Clearly, as spelled out in the U.N. Charter, the organization enjoys competence in the field of human rights and has long studied proposals for the establishment of an international criminal court.<sup>98</sup> Still, given the nature of United Nations debates in general, and deliberations over an international criminal court in particular, enthusiasm about the efficiency or eventual success of the U.N. approach can hardly be expected.

The most expeditious manner for establishing a war crimes panel — and the approach taken through Security Council Resolutions 827 and 808 — is to have the Security Council create an ad hoc tribunal designed specifically to prosecute accused perpetrators of atrocities in

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*Gulf War*, 31 VA. J. INT'L L. 391, 395 (1991).

98. See M. CHERIF BASSIOUNI, A DRAFT INTERNATIONAL CRIMINAL CODE AND DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL TRIBUNAL (2nd ed. 1987); BENJAMIN FERENCZ, AN INTERNATIONAL CRIMINAL COURT: A STEP TOWARD WORLD PEACE: A DOCUMENTARY HISTORY AND ANALYSIS (1980); and M. Cherif Bassiouni & Christopher Blakesley, *The Need for an International Criminal Court in the New International World Order*, 25 VAND. J. TRANSNAT'L L. 151 (1992).

the ongoing conflict in the former Yugoslavia. The Security Council is empowered to do so on the basis of the authority conferred to it in Chapter VII of the U.N. Charter. Article 39 provides that the Security Council

shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.<sup>99</sup>

Under this mandate, the Council has the lawful authority to make a determination that heinous war crimes and serious violations of international humanitarian law committed during the armed conflicts in the territory of the former Yugoslavia constitute threats to or breaches of the peace. Such a tribunal is also necessary to restore and maintain international peace and security in the region. This approach is embraced in Security Council Resolutions 827 and 808.

Given its legal authority, the operative provision enabling the Security Council to establish an ad hoc tribunal is found in Article 41 of the Charter, which provides the following:

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.<sup>100</sup>

At first blush, the measures in Article 41 might appear far estranged from the creation of a war crimes court. The point must be underscored, however, that this list is only illustrative of certain options, and not inclusive of all measures that might be employed by the Security Council. Clearly, the phrase declaring that the Security Council may determine "what measures not involving the use of armed force" it may wish to employ implicitly leaves open any available options. The creation of an international tribunal stands as an appropriate measure if such a court would contribute to attaining or facilitating the restoration of international peace and security in the region. This fundamental premise provides the foundation for the Security Council's actions in adopting Resolutions 827 and 808.

## *B. Competence of the International Tribunal*

### *1. Lawful Authority*

The Statute of the International Tribunal will govern the tribunal

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99. U.N. CHARTER art. 39.

100. *Id.* art. 41.



and provide the framework for its deliberations.<sup>101</sup> A similar document was drafted for the Nuremberg trials, and such a charter is critical for structuring the organization, responsibilities, and functions of the tribunal.

The Secretary-General drafted specific language for the present Statute, based on formulations for provisions found in existing international instruments as well as from suggestions for draft articles received from states, organizations, and individuals during 1992-1993.<sup>102</sup> The legal rationale for the Tribunal's creation and the explanation of provisions comprising the Statute are contained in the "Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)."<sup>103</sup> In adopting Resolution 827, the Security Council approved this report, thereby creating the Tribunal and adopting the language prepared by the Secretary-General.

In terms of international law, a critical consideration underpinning the Balkans war crimes tribunal is that it has been established by international authority and exercises a jurisdiction that is internationally conferred. This will entail enforcement of the laws of war through military courts set up by the armed forces of the aggrieved state, whose power of law enforcement stems from that state government alone.

The International Tribunal established under U.N. Security Council Resolutions 827 and 808 was adopted unanimously. Under the U.N. Charter, to which 184 states are now party (including the Republic of Yugoslavia [Serbia], Bosnia-Herzegovina, and Croatia), member states are bound in Article 24 to abide by substantive decisions adopted by the Security Council.<sup>104</sup> These Security Council decisions are legally binding, authoritative, and controlling.<sup>105</sup> They carry the force of law. Creation of the Balkans tribunal under that procedure, therefore, endows that body with international legitimacy and authoritative jurisdiction.

## 2. Subject-Matter Jurisdiction

Now formally established, the International Tribunal is allocated the legal competence to deal with designated crimes that are of an

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101. The Statute of the International Tribunal is annexed to the *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808* (1993), U.N. DOC. S/25704 (3 May 1993), at 36 [hereinafter Statute of the International Tribunal].

102. *Id.* at 5.

103. *Id.*

104. U.N. CHARTER art. 24.

105. As substantiated in Article 25, "the Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter." *Id.* art. 25.

international character, perpetrated by certain persons, during a specified time period, in a given territory. In this respect, the competence of this court flows from its Statute and its jurisdiction over criminal subject matter. Four clusters of crimes can be prosecuted under the Statute: (1) grave breaches of the 1949 Geneva Conventions; (2) violations of the laws or customs of war; (3) genocide; and (4) crimes against humanity.

#### a. Grave Breaches of the 1949 Geneva Conventions

The Tribunal has been given the competence to prosecute certain punishable crimes, including those laid down by the Nuremberg Precedent, that protect persons under international humanitarian law. Perhaps the clearest enumeration of these offenses is found in the four Geneva Conventions of 1949, in particular common article 50/51/130/147 of those instruments.<sup>106</sup> This provision defines the "grave breaches" of international humanitarian law that states are required to punish and that are contiguous to the offenses contained in Article 3 common to all four Geneva Conventions.<sup>107</sup> Common article 50/51/130/147 also prescribes minimum rules applicable to situations of armed conflict that are not international in character.

The Statute of the International Tribunal incorporates the essential language of this common provision of "grave breaches" into Article 2, which gives the Tribunal power to prosecute persons "committing or ordering to be committed" the following acts:

- (a) willful killing;
- (b) torture or inhuman treatment, including biological experiments;
- (c) willfully causing great suffering or serious injury to body or health;
- (d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
- (e) compelling a prisoner of war or a civilian to serve in the forces

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106. As defined in the four 1949 Geneva Conventions, certain "grave breaches" are crimes committed against persons or property protected by the conventions and include:

- (a) Willful killing, torture, or inhuman treatment of protected persons;
- (b) Willfully causing great suffering or serious injury to the body or health of protected persons;
- (c) Taking of hostages and extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly;
- (d) Unlawful deportation or transfer or unlawful confinement of a protected person;
- (e) Compelling a prisoner of war or other protected person to serve in the forces of a hostile power; and,
- (f) Willfully depriving a prisoner of war or other protected person of the rights of fair and regular trial prescribed in the Geneva Conventions.

1949 Geneva Conventions, *supra* note 27, arts. 50, 51, 130, 147.

107. See *supra* text accompanying note 28.

- of a hostile power;
- (f) willfully depriving a prisoner of war or a civilian of the rights of fair and regular trial;
- (g) unlawful deportation or transfer or unlawful confinement of a civilian;
- (h) taking civilians as hostages.<sup>108</sup>

Two notable improvements are made in Article 2 over the 1949 Geneva Conventions. First, in paragraph (b), "biological experiments" have been specified as a form of prohibited "inhuman treatment." Second, the language in the provision has been adjusted to replace the notion of "protected persons" with a specific designation of "civilians." In this way, commission of grave breaches of the laws of war are directly referenced to civilians under the Statute, regardless whether the conflict is legally interpreted to be an internal or an international war.

#### b. Violations of the Laws or Customs of War

Another important part of international humanitarian law is found in the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land and the regulations annexed thereto.<sup>109</sup> While covering facets of international humanitarian law later incorporated into the 1949 Geneva Conventions, the Hague Regulations importantly stipulate that the right of belligerents to fight war is not unlimited. Indeed, the rules of land warfare prohibit certain methods of waging war. As prescribed in the Statute, persons may be prosecuted for violating the laws or customs of war (as derived from the Hague Regulations), including, but not restricted to, the following:

- (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;
- (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
- (c) attack, bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;
- (d) seizure of, destruction or willful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;
- (e) plunder of public or private property.<sup>110</sup>

The origin of these provisions lies in Articles 23-28 of the 1907 Hague Regulations. These provisions are specifically intended to punish persons who have engaged in indiscriminate bombardment of civilian population centers without military need or justification.

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108. Statute of the International Tribunal, *supra* note 101, art. 2; *cf.* 1949 Geneva Conventions, *supra* note 106, arts. 50, 51, 130, 147.

109. See Hague Convention No. IV, *supra* note 24.

110. Statute of the International Tribunal, *supra* note 101, art. 3; *see also* Hague Convention No. IV Annex (Regulations), *supra* note 24, arts. 23, 25, 27, 28.

### c. Genocide

Also, within the context of crimes committed within the territory of the former Yugoslavia, the 1948 Convention on the Prevention and Punishment of Genocide directly relates to actions to be prosecuted by the tribunal.<sup>111</sup> The Statute for the new court makes this plain, providing in Article 4 that the Tribunal will prosecute persons accused of genocide. In this provision, genocide is defined as any of the following acts, "committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such":

- (a) killing members of the group;
- (b) causing serious bodily or mental harm to members of the group;
- (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) imposing measures intended to prevent births within the group;
- (e) forcibly transferring children of the group to an other group.<sup>112</sup>

In paragraph 3 of Article 4, the Statute stipulates that the following acts shall be punishable:

- (a) genocide;
- (b) conspiracy to commit genocide;
- (c) direct and public incitement to commit genocide;
- (d) attempt to commit genocide;
- (e) complicity to commit genocide.<sup>113</sup>

It is significant that these paragraphs in Article 4 of the Statute were incorporated verbatim from Articles II and III, respectively, of the 1948 Genocide Convention. Much has been made about the incredible violence directed specifically against the Muslim population in Bosnia-Herzegovina — violence motivated principally by ethnic, cultural, and religious heritage. Specific inclusion in the Statute for prosecution of the crime of genocide is intended to redress such gross violations of international humanitarian law.

### d. Crimes Against Humanity

The Tribunal must address the most serious war crimes: those that have been committed on a massive scale, in a systematic manner, that cause acute revulsion, and make necessary a direct international response. The Tribunal must assert its jurisdiction over cases that allege crimes against humanity, for which there are no statutory limitations.<sup>114</sup> As criminal conduct, such acts have their origins in the

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111. Application of the Genocide Convention is warranted by the purposeful use of "ethnic cleansing" to drive out Muslims from Bosnia-Herzegovina.

112. Statute of the International Tribunal, *supra* note 101, art. 4, para. 2.

113. *Id.* art. 4, para. 3.

114. This is provided for in the Convention on the Non-Applicability of Statutory

Nuremberg Charter.<sup>115</sup> Crimes against humanity are aimed at any civilian population and are prohibited in armed conflict, regardless of its international or internal character. The Statute acknowledges this critical point in Article 5, then enumerates eight categories of specific acts that will be treated as crimes against humanity by the Tribunal: (1) murder; (2) extermination; (3) enslavement; (4) deportation; (5) imprisonment; (6) torture; (7) rape; and (8) persecution on political, racial or religious grounds. A ninth category, "other inhumane acts," is included to make the list potentially all-inclusive.<sup>116</sup>

Crimes against humanity emanate from Article 6 of the 1945 Nuremberg Charter.<sup>117</sup> In the case of the former Yugoslavia, two new acts have specifically been designated as crimes against humanity: torture and rape. The heinousness and condemnation of acts of torture finds expression in the 1984 Convention Against Torture,<sup>118</sup> which now is in force and accepted as a peremptory norm in human rights law. The crime of rape, the criminality of which largely was overlooked in past wars, took on great urgency with the reported massive violations of women in Bosnia-Herzegovina during 1992 and 1993.<sup>119</sup> By designating rape as a crime against humanity, the criminality of the act in international law has been spotlighted, and international concern has been directly focused on the need to punish perpetrators.

A final point merits mention. The Balkan War Crimes Tribunal will not specifically address crimes against the peace, i.e., it will not prosecute persons for participation in planning and waging of a war of aggression. Proving these allegations would be protracted and extraordinarily difficult. The amount of documentation containing plans and war strategies is unknown, and securing access to military and diplomatic records of the governments involved — especially the Federal Republic of Yugoslavia (for Serbia), as well as Croatia and Bosnia-Herzegovina — would not come easy. Confirmation that all requested documents have been duly turned over to court investigators is highly unlikely from government leaders who themselves are likely to be the targets of investigation. Such persons will not automatically escape prosecution, however, since individual criminal responsibility is acknowledged for planning gross violations of international humanitarian law.

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Limitations to War Crimes and Crimes against Humanity, Nov. 26, 1968, 754 U.N.T.S. 73, reprinted in 8 I.L.M. 68 (1969).

115. See *supra* text accompanying notes 11-14.

116. Statute of the International Tribunal, *supra* note 101, art. 5.

117. See *supra* text accompanying note 8.

118. Convention Against Torture, *supra* note 40.

119. See *supra* text accompanying notes 72-78.

### 3. Personal Jurisdiction

The principle of individual criminal responsibility is critical to the function of the Tribunal. The Statute of the Tribunal addresses this concern in Article 7, as it asserts that "a person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime."<sup>120</sup> The war crimes court thus confronts the principle that individuals may be held criminally liable under international law, even though their conduct might have been considered valid or even mandated by domestic law.

It will not be enough to enforce the laws of war only against ordinary soldiers and officers of law of mid-level rank. The Tribunal's hand of punishment must reach up to military elites and civilian government officials. Article 7 of the Statute provides for such punishment:

2. The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.

3. The fact that any of the [criminal] acts . . . of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.<sup>121</sup>

All persons who participate in the planning, preparation, or execution of serious violations of international humanitarian law in the former Yugoslavia share in the commission of the crime and are therefore individually responsible. The Tribunal will also hold that the principal responsibility for war crimes pursuant to orders falls to those in authority who gave the orders.

The Tribunal may find it difficult to draw a clear line between war crimes proper and "crimes against humanity." It may also be difficult to set the precise scope of the latter.<sup>122</sup> In any event, it has become a recognized precept of contemporary international law that persons pledged to obey orders of their superiors, in particular those issued by heads of state and governments, are held personally responsible for acts committed by their subordinates.<sup>123</sup> The Statute of the

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120. Statute of the International Tribunal, *supra* note 101, art. 7, para. 1.

121. *Id.* art. 7, paras. 2, 3.

122. The law relating to war crimes is clear and has been set out in numerous international law-making instruments. See Hague Convention IV, *supra* note 24, arts. 46, 50, 52, 56; 1949 Geneva Conventions, *supra* note 27, art. 3.

123. See *supra* text accompanying notes 19-21.

Tribunal makes this clear and unambiguous.

This expansion of individual liability aims to reaffirm the principle that the laws of war and other rules of international humanitarian law *are* superior to domestic law, and that individuals *are* accountable to them. In contemporary international law, individuals have international duties that transcend facets of national obedience required by a particular state. Violation of international law in allegiance to national law is a violation nonetheless; that circumstance can not remove the stigma of contravention. Accordingly, persons who violate the laws of war in the name of their state are no less accountable for their actions. Indeed, the Tribunal implicitly embraces this point. Individuals who violate international humanitarian law or the laws of war can not find automatic immunity in the authority of national law or allegiance to the state.

Establishment of the International Tribunal was not intended to preclude the exercise of jurisdiction of national courts in the prosecution of persons responsible for serious violations of law committed within the territory of the former Yugoslavia since 1991. The Statute asserts that concurrent jurisdiction will exist between the International Tribunal and national courts to prosecute such persons.<sup>124</sup> Even so, to avoid complications arising from the principle of *non-bis-in-idem* (i.e., a person may not be tried twice for the same crime), the Statute asserts "primacy" over national courts. This means that the Tribunal may request national courts to defer prosecution to the competence of the International Tribunal.<sup>125</sup>

#### 4. Territorial and Temporal Jurisdiction

The competence of the Tribunal has also been fixed in terms of territorial and temporal jurisdiction. Regarding the scope of the International Tribunal's territorial jurisdiction, the territory of the former Yugoslavia is construed to mean that of "the former Socialist Federal Republic of Yugoslavia, including its land surface, airspace and territorial waters."<sup>126</sup> The Tribunal's jurisdiction will extend only to acts that have been committed by persons since the dissolution of the former Socialist Federal Republic of Yugoslavia, which precipitated the outbreak of hostilities in the region. The Secretary-General decided to fix to begin the precise date for violations to begin on or after January 1, 1991, a neutral date not linked to any specific event.<sup>127</sup>

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124. Statute of the International Tribunal, *supra* note 101, art. 9, para. 1.

125. *Id.* art. 9, para. 2.

126. *Id.* art. 8.

127. Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), U.N. DOC. S/25704 (3 May 1993), at 16; Statute of the International Tribunal, *supra* note 101, at art. 8. Other commentators suggested the beginning date for violations as June 1, 1991, the month that Croatia and Slovenia

### C. *Composition of the Tribunal*

The International Tribunal for the former Yugoslavia is international in character. As a result, single-nation courts are welcome but insufficient for issuing authoritative interpretations of international law and for establishing international jurisdiction and operable administrative procedures that might permit international penal law to function satisfactorily. The Statute provides for concurrent jurisdiction with national courts; in cases where jurisdiction overlaps, however, primacy is reserved for the International Tribunal.

The International Tribunal consists of three main organs: (1) the Chambers, comprised of two Trial Chambers and one Appeals Chamber; (2) the Prosecutor; and (3) the Registry.

#### 1. The Chambers

The organization of the Tribunal reflects its intended functions. There are to be eleven independent judges, no two of whom are nationals of the same state. Three judges serve in each of the two Trial Chambers, and five judges serve in the Appeals Chamber.<sup>128</sup>

Judges on the Tribunal must be qualified in international law, international criminal law, and have a special appreciation for human rights law. In the language of the Statute, judges must be "persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices."<sup>129</sup> They should also be representative of the principal legal systems of the world. Unlike the Nuremberg court, which had representatives only from France, the Soviet Union, the United States, and the United Kingdom (the four victorious powers of World War II), the Balkans tribunal will reflect a multinational, multicultural composition.

A critical necessity is that judges selected for the Tribunal be considered without dispute and reservation legitimate representatives

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formally proclaimed their independence from Yugoslavia. See Chuck Sudetic, *2 Yugoslav States Vote Independence to Press Demands*, N.Y. TIMES, June 26, 1991, at A1.

128. Statute of the International Tribunal, *supra* note 101, art. 12. In its formal proposal to the U.N. Secretary-General, France suggested fifteen judges appointed by the Security Council to serve on the Tribunal. *Letter Dated 10 February 1993 from the Permanent Representative of France to the United Nations Addressed to the Secretary-General*, U.N. DOC. S/25266 (1993), at 60 [hereinafter *French Tribunal Proposal*]. The United States proposed that eighteen judges be selected, nine for the Tribunal and nine for an appeals court. *Letter Dated 5 April 1993 from the Permanent Representative of the United States to the United Nations Addressed to the Secretary-General*, U.N. DOC. S/25575 (1993), UNITED NATIONS, CREATION OF AN INTERNATIONAL TRIBUNAL FOR VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW IN THE FORMER YUGOSLAVIA, at 1 (art. 2.) [mimeographed].

129. Statute of the International Tribunal, *supra* note 101, art. 13, para. 1.



to the court.<sup>130</sup> This is assured through the procedure of their election by the General Assembly from a list submitted by the Security Council.<sup>131</sup> As formally set out, the Secretary-General invites nominations for candidates from member states in the United Nations as well as from non-member states maintaining permanent observer missions at U.N. Headquarters. Those nominations are forwarded to the Security Council, which then composes from them a list of at least twenty two, but no more than thirty three, candidates. That list of candidates is then forwarded to the General Assembly, which elects by absolute majority eleven judges to serve on the Tribunal. Judges serve a term of four years, and are eligible for re-election.<sup>132</sup> Judges are also made responsible for drafting and adopting rules of evidence and procedure that the Tribunal will use in the pre-trial phase of its proceedings as well as in the conduct of trials and appeals, the admission of evidence, and the protection of victims and witnesses.<sup>133</sup>

## 2. The Prosecutor

An independent Prosecutor is to be entrusted with the responsibility of conducting investigations and prosecutions of persons alleged to have committed serious violations of international humanitarian law in the territory of the former Yugoslavia since January 1, 1991.<sup>134</sup> The need for such an office is clear. The Tribunal is endowed with sufficient powers as necessary and appropriate to conduct criminal trials and appeals. These powers, which are spelled out clearly in the Statute establishing the Tribunal's authoritative legal competence, include the powers to issue arrest warrants, to summon and question

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130. One proposal to ensure this precondition would have had existing international jurisdictions elect from the ranks of their sitting or former members persons to serve on the Tribunal. International juridical bodies that offered well-established guarantees of impartiality would have included the International Court of Justice, the European Court of Human Rights, the Inter-American Court of Human Rights, and the African Commission of Human Rights. See *French Tribunal Proposal*, *supra* note 128, at 45.

131. Statute of the International Tribunal, *supra* note 101, art. 13, para. 2.

132. *Id.* art. 13. On September 17, 1993, the U.N. General Assembly selected the eleven judges to serve on the Balkans tribunal. They are Elizabeth Odio Benito (Costa Rica), Jules Deschenes (Canada), Antonio Cassese (Italy), Georges Michel Abisaab (Egypt), Li Haopel (China), Germain le Foyer de Costil (France), Lal Chand Vohrah (Malaysia), Rustam S. Sidhwa (Pakistan), Sir Ninian Stephen (Australia), Adolphus Godwin Karibi-Whyte (Nigeria), and Gabrielle Kirk McDonald (United States). Significantly, none of the judges is Muslim, although judges were selected from three Muslim states — Pakistan, Egypt, and Malaysia. *War Crimes Judges Named*, N.Y. TIMES, Sept. 18, 1993, at 18.

133. *Id.* art. 15. Such rules of evidence and procedure have recently been promulgated to guide the investigation and prosecution of alleged offenders. See International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia, *Rules of Procedure and Evidence*, IT/32, Mar. 14, 1994.

134. *Id.* art. 16.

witnesses, to require submission of documents and evidentiary materials, to administer oaths to witnesses, and to conduct appropriate proceedings aimed at securing evidence. Concerning the intricate details of juridical functions, certain fundamental questions must be addressed in prosecuting each case:

- (1) What is the offense that is alleged?
- (2) Can the offender(s) be identified?
- (3) To what degree was the accused offender responsible?
- (4) Was the offense committed on the offender's own initiative, or in obedience to orders?
- (5) What evidence is available to support the charge?
- (6) What will be a probable defense?
- (7) Can an offender be put on trial with reasonable expectation of conviction?

Depending on the number of cases to be handled by the Tribunal, these queries are neither insignificant in scope nor petty in substance. The role of the Prosecutor becomes essential for transforming these queries into a prosecutable case.

Prior to trial before a Chamber of the Tribunal, the Prosecutor will undertake preparatory work relating to cases submitted for trial. The Prosecutor's staff will work to gather facts and evidence, facilitate examination of individual cases submitted by investigators, and compile lists of accused war criminals. The purpose of this special Prosecutor's office is to determine whether *ex parte* material submitted for prosecution is sufficient to disclose a *prima facie* case. Such a prosecutorial staff does not have juridical functions; rather it operates more in the manner of a grand jury. The notion of "independence" here is critical; the Prosecutor should neither seek nor receive instructions from any government or other source.<sup>135</sup>

Regarding case preparation, this investigatory body must confirm evidence already gathered and seek further evidence for and against the accused. Toward this end, several investigatory measures will have to be undertaken, including, *inter alia*, questioning the accused, obtaining testimony from victims and witnesses, confronting witnesses and taking depositions, compiling written and other documentary evidence, and conducting visits to crime scenes. These measures are prescribed in the Statute.<sup>136</sup>

The Prosecutor will have to rely on the good faith, accuracy, and

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135. *Id.* art. 16, para. 2.

136. *Id.* art. 18.

diligence of investigators in presenting cases involving actual violations of the laws of war. In examining whether *prima facie* evidence existed in each instance, the investigatory-prosecution staff must examine the charges to determine, first, whether there had been a violation of international humanitarian law and, second, whether there existed sufficient facts to constitute violation of that law. In these regards, certain critical questions must be addressed by investigators: (1) Do the charges made disclose the existence of a violation of humanitarian law?; (2) Does sufficient evidence exist to identify an alleged offender?; and (3) Does a good reason exist for assuming that, if prosecuted, an alleged offender would be convicted? Negative answers to any of these questions might be sufficient cause for dismissal of a case.

Once an investigation has been completed, at least three options are available for each case. First, a case can be dismissed on grounds of insufficient evidence. Second, a case can be turned over to an appropriate national court if the offenses of an accused defendant are determined to be less than those within the Tribunal's competence. Third, a case can be transmitted for review to a judge of a Trial Chamber in the form of an indictment that specifies the particular charges.<sup>137</sup> If that judge confirms the indictment, the judge then issues, at the request of the Prosecutor's office, the necessary orders and warrants for the arrest, detention, surrender, or transfer of that person so that a trial can be conducted.<sup>138</sup>

### 3. Trial Proceedings

There is little doubt that it will be difficult to secure physical jurisdiction over certain persons, particularly high government officials accused of committing or ordering indictable offenses. This opens up consideration for the possibility of trials being conducted against accused offenders in their absence. The Statute of the Tribunal, however, clearly rejects this possibility. A trial can not begin until the accused is physically present before the court.<sup>139</sup>

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137. *Id.*

138. *Id.* art. 19.

139. See Statute of the International Tribunal, *supra* note 101, art. 21, para. 4(d). This requirement avoids the controversial possibility that persons might be tried *in absentia*. While not desirable, trials *in absentia* reflect political realities of the situation. Even so, the option for such trials and details of undertaking that procedure were rejected by the Secretary-General in favor of the requirement for having a defendant present so that fairness of proceedings can not be impugned. *Id.* at art. 26, para. 101.

The argument supporting trials *in absentia* is understandable: Persons who have been indicted, but who managed to avoid apprehension, would be made subject to justice under the principle of universal jurisdiction. Guilty defendants would be made susceptible to apprehension, arrest, prosecution, and punishment by all governments, and extradition could be performed back to the Tribunal or the properly designated

Under the Tribunal's Statute, the accused are guaranteed certain internationally recognized rights and standards, as contained in Article 14 of the 1966 International Covenant on Civil and Political Rights.<sup>140</sup> The Statute incorporates those rights of the accused in Article 21 as four fundamental rights of all persons: (1) to be equal before the Tribunal; (2) to be entitled to a fair and public hearing; (3) to be presumed innocent until proven guilty; and (4) to be entitled to minimum guarantees. The minimum rights guaranteed to defendants are as follows: (a) to be informed promptly and in a comprehensible language of the nature of the charge; (b) to have adequate time and facilities for the preparation of his defense; (c) to be tried without undue delay; (d) to be tried in his own presence and to defend himself in his own person or through legal assistance if unable to afford payment; (e) to examine witnesses against him; (f) to have the free assistance of an interpreter; and (g) not to be compelled to testify against himself or confess guilt.<sup>141</sup> Similarly, given the nature of the crimes committed in the former Yugoslavia, especially in cases of rape and sexual assault, the Statute mandates that victims and witnesses must be protected, including *in camera* proceedings and protection of a victim's identity.<sup>142</sup>

#### 4. Judgment and Appeal

The Trial Chambers are given the authority to pronounce judgment and impose sentences and penalties on persons convicted of violations of humanitarian law and the laws of war. A judgment is rendered by a majority of the judges in a Chamber and publicly delivered by written opinion.<sup>143</sup> Significantly, unlike Nuremberg, penalties are limited to imprisonment. The International Tribunal is not authorized

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national authority after the court has been disbanded. In addition, under the 1951 Geneva Convention on the Status of Refugees, which has some 111 parties, including the former Yugoslavia, parties are prohibited from granting refugee status to any person when serious grounds exist for believing that person "has committed a crime against the peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes." Convention Relating to the Status of Refugees, July 28, 1951, art. 1(F), 189 U.N.T.S. 150. This provision further erodes the possibility that an accused defendant might be granted asylum by some government on grounds of the political offenses exception. As a consequence, guilty verdicts by the Tribunal would leave *in absentia* offenders isolated in their states, susceptible to extradition and trial once they travel abroad. Guilty verdicts might also serve as particular deterrents to government officials and military personnel elsewhere who come to contemplate similar genocidal atrocities against civilians.

These arguments aside, as prescribed by the Statute, the International Tribunal will not conduct such trials in the physical absence of a defendant.

140. International Covenant on Civil and Political Rights, *supra* note 40, art. 14.

141. Statute of the International Tribunal, *supra* note 101, art. 21.

142. *Id.* art. 22.

143. *Id.* art. 23.

to issue the death penalty to convicted persons.<sup>144</sup> Obviously, any judgment rendered by the Tribunal must be done in accordance with the general principles of international law.<sup>145</sup>

To ensure the basic norms of due process, the right of defendants to appeal to an independent appellate panel is included. The Statute establishes an Appeals Chamber comprised of five judges.<sup>146</sup> This court will hear appeals from a person convicted by the Trial Chambers on grounds that the Trial Court committed an error of law that invalidates the decision or that an error of fact occurred that caused a miscarriage of justice.<sup>147</sup> Enforcement of sentences will be done by states that indicate their willingness to do so to the Security Council. Enforcement will be done in accordance with the domestic laws of those states, outside the territory of the former Yugoslavia.

Establishment of the International Tribunal by the Security Council on the basis of a Chapter VII decision is sufficient to create the obligation for U.N. member states to cooperate in implementing that decision. Member governments are therefore expected to cooperate with the International Tribunal in gathering evidence, locating witnesses and suspects, identifying persons, and servicing documents such as arrest warrants, search warrants, and surrender warrants. In this connection, states are expected to surrender or transfer those persons indicted and ordered for trial by a Trial Chamber.<sup>148</sup>

##### 5. Other Considerations

Four final administrative points are worth noting. First, the Statute provides for the establishment of a special Registry to service the International Tribunal. This organ, headed by a Registrar, will be responsible for such functions as providing public information, recording the proceedings, printing and publishing documents, administering budgetary and personnel matters, and serving as the communications channel for the Tribunal.<sup>149</sup> Second, funding for the Tribunal can not help but complicate the United Nations's tight budgetary situation. Nevertheless, since the Tribunal is considered a subsidiary appendage of the United Nations, its activities will be financed out of the regular United Nations' budget, in line with Article 17 of the U.N. Charter.<sup>150</sup>

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144. *Id.* art. 24, para. 1.

145. *London Charter, supra* note 5, art. 26.

146. Statute of the International Tribunal, *supra* note 101, arts. 12, 25.

147. *Id.* art. 25, para. 1.

148. *Id.* art. 29.

149. Statute of the International Tribunal, *supra* note 101, at 23, art. 17.

150. *Id.* art. 32. If, however, the Tribunal had been considered part of a Security Council peacekeeping operation, created under Chapter VII of the Charter, financing might have been performed through a weighted scale of contributions from U.N. Security Council members. The possibility also existed of soliciting voluntary contributions from member states for the Tribunal's activities.

Third, the site most likely for the International Tribunal is in the Hague, Netherlands.<sup>151</sup> Fourth, the Tribunal's working languages will be English and French.<sup>152</sup>

## V. THE BALANCE SHEET

Law consists of rules for determining conduct and is the servant of its creators. The function of law must be derivative, not overbearing. While law strives for standards of responsibility, those standards must be fixed with due regard to the demands of justice. Similarly, a relationship exists between legal norms and humanitarian values, though that relationship is sometimes skewed by political interests. Legal norms rest in the body of humanitarian law fashioned for the most part during this century. International law becomes a definite and positive reality, both in character and consequences, when competent courts acting under legal sanction prosecute persons and sentence them to punishments that are carried out by competent authorities. There exists under contemporary international law a principle of individual liability. In ordinary war crimes, those who carry out unlawful acts are personally liable. No moral or logical justification exists for applying different rules in the case of generalized crimes charged against leaders of unjust belligerent states.

Establishment of the International Tribunal for the former Yugoslavia offers a signal opportunity for the contemporary law of armed conflict: the international community has the potential to reassert an international jurisdiction for the development of the international penal law of war, to reaffirm compellingly the individual's obligation to comply with internationally recognized standards of conduct, to reawaken application of law prohibiting war crimes, genocide, and crimes against humanity, and to expand considerably the individual's criminal liability for violations of the laws of war.

The International Tribunal for the former Yugoslavia also holds the potential to reaffirm the sense of moral and political purpose that underpins the laws of war. Since the Nuremberg trials, prosecution of violations of the laws of war have been mainly cloistered in little-publicized, national court-martial proceedings. The new Tribunal offers the opportunity to bring to justice accused persons of all the warring factions, of all ranks — from the partisan irregular, to the lowly army private, to commanding military officers and high government officials.

In these regards, it is imperative that the Tribunal not be used as a bargaining chip in the diplomatic dealing aimed at bringing about an end to the conflict. The Balkans war crimes panel appears principally aimed against the Serbs, since the evidence overwhelmingly indicates

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151. *Id.* art. 31.

152. *Id.* art. 33.

most human rights abuses have been perpetrated by partisan Serb forces. It would be wrong to trade away the Tribunal's proceedings in exchange for Serbian concessions in negotiations for bringing about an end to the hostilities. Resort to brutal, unlawful means to accomplish an unlawful geopolitical end should not be rewarded by casting aside the institutional means for obtaining just restitution under international law.

The laws of war, long established and well recognized by states, remain blurred around the margins. Their enforcement is sporadic and often susceptible to change given rapid development in the circumstances and technology of warfare. In part this is attributable to the customary nature of the laws of war and to the lack of any authoritative source or systematic means of enforcement. There is no standing legislature to prescribe an authoritative text of the rules, there is no standing court to deal with transnational violations, and there are no universally prescribed penalties for violations. In sum, the laws of war are earmarked by amorphous, shifting qualities that comport with the nature of war itself.

The *lex lata* in international human rights law has evolved from such sources or dictates of public conscience and laws of humanity. The linkage between the Nuremberg Precedent, international humanitarian law, and the broad body of human rights law must not go unappreciated. For in truth the Nuremberg principles remain a challenge to governments and elites who systematically violate the laws of war and fundamental principles of human rights. In a statist system earmarked by considerations of sovereignty, the legal situation must be recast into an international community that seeks to attain a higher legal order — one in which the rule of law is more humane, more just, and more acutely conscious of its place in regulating, punishing, and being more committed to preventing violence and conflict. The tragic armed conflict in the territory of the former Yugoslavia offers a proving ground for reviving the relevance of the Nuremberg Precedent and its attendant legal principles for modern international law.

The process to codify human rights norms has obtained a sense of legitimacy, especially over the last five decades. This applies to international humanitarian law, which also provides for the protection of basic individual and collective human rights. In essence, the manner in which the legal structure has developed makes it politically more costly for states and individuals to suppress human rights and to violate principles of international humanitarian law. Justice remains a cherished concept; demonstrating respect for victims of human rights abuses ranks among the most visible manifestations of that justice. The keystone for making this respect real is the availability of credible sanctions to punish violators. It is here especially that the International Tribunal for crimes committed in the former Yugoslavia takes on

landmark significance.<sup>153</sup>

## VI. CONCLUSION

It is widely believed today that persons in the government of the Federal Republic of Yugoslavia (in particular, the Republic of Serbia) are guilty of committing war crimes, genocide, and crimes against humanity. There is no question that the state, as a juridical person under international law, is responsible for crimes committed by persons in its government and armed forces against peoples in other states. Furthermore, given the record at Nuremberg, no doubt exists that Serbia's government leaders, civilian elites, military officers, and enlisted personnel could be made personally liable to trial and punishment by an international tribunal if evidence intimates that they ordered, participated in, or failed to halt the commission of these crimes. Violation of the laws of war on orders of a government or an individual military commander does not remove the stigma of a war crime from that act. Acting on superior orders no longer constitutes a valid defense for an individual accused of committing a war crime. These propositions entail what has become known in international law as the "Nuremberg Precedent."

International law is partially a product of natural law. It has grown and developed from workings of moral impulses and needs of humankind through a quasi-instinctive evolution, as well as by decrees, authoritative pronouncements, and treaty agreements. International law in general, and the law of Nuremberg in particular, takes shape and definition when such law is recognized by common consensus of the international community and administered and enforced by competent courts.

The case of prosecuting persons responsible for committing atrocities in the territory of the former Yugoslavia highlights this fundamental obligation to obtain justice for wrongs inflicted upon the innocent. A principal duty exists therefore for states, international organizations, and individuals to work within the framework of an international legal regime.

For the armed conflicts ongoing in the Balkans, that legal regime takes the form of a competent court to prosecute and punish persons who have grossly committed violations of international humanitarian law. Only in this manner can credibility be restored to the Nuremberg principles. Only in this manner can just restitution be made to redress the pervasive suffering caused by brutal violations of fundamental human rights throughout Bosnia-Herzegovina. Only in this manner

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153. Compare with the argument advanced by James C. O'Brien, *The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia*, 87 AM. J. INT'L L. 639 (1993).



can international humanitarian law obtain sufficient legal integrity in the post-Cold War era to render it politically effective as a deterrent against future depredations of fundamental human rights during situations of armed conflict.